Laborers International Union of North America, Local No. 121 *and* Plumbers, Steamfitters and Marine Fitters Local No. 290, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO and Meissner & Wurst/Marshall Construction, Inc., a Joint Venture and Scott Co. of California, Inc. Case 36–CD–206

March 23, 1998

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

The charge in this Section 10(k) proceeding was filed on January 6, 1997, by Plumbers, Steamfitters and Marine Fitters Local No. 290, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 290), alleging that the Respondent, Laborers International Union of North America, Local No. 121 (Local 121), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Meissner & Wurst/Marshall Construction Inc., a Joint Venture (MWM), to assign certain work to employees represented by Local 121 rather than to employees represented by Local 290. The hearing was held on February 20, 1997, before Hearing Officer Jeffrey E. Jacobs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

MWM is a joint venture formed by Meissner & Wurst, an engineering firm, and Marshall Contractors, a construction firm, to manage the construction of Hyundai Corporation's silicone wafer manufacturing facility in Eugene, Oregon. MWM has its principal place of business in Eugene, Oregon. Since its creation in March 1996, MWM had gross revenue in excess of $1 million and purchased and received at the Hyundai construction site in Eugene, Oregon, goods and services valued in excess of $50,000 from suppliers located outside the State of Oregon. Scott Co. of California (Scott) is a subcontractor of MWM at the Hyundai construction site and performs plumbing, piping, venting, and HVAC construction. Scott's principal place of business is in California. As a subcontractor at the Hyundai construction site in 1996, Scott received revenue from MWM in excess of $1 million and purchased and received at the Hyundai construction site in Eugene, Oregon, goods and material valued in excess of $50,000 from suppliers located outside the State of Oregon. We find, and the parties do not dispute, that MWM and Scott are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[1] Further, the parties stipulate, and we find, that Local 121 and Local 290 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

As the general contractor, MWM is responsible for managing the construction of three buildings at Hyundai's site in Eugene, Oregon. The principal building under construction is the fabrication facility, also known as the ''fab,'' in which silicone chips will be manufactured for use in computers. After completion of the fab, approximately one-third of the structure will be maintained as a ''clean room,'' a carefully monitored and controlled environment essential to the production of silicone chips. In order to ultimately achieve clean room status upon completion, the fab must meet specific standards of cleanliness at various intervals during its construction. In December 1996, after the floor, four walls, and most of the roof were in place, MWM announced that the fab must now meet a cleanliness level designated Protocol 1, which essentially called for the structure to be ''broom clean'' on a daily basis.

Broom clean status, however, was initially not easy to achieve. Due to unusually heavy rains in the Northwest in the later part of 1996, the fab had a good deal of standing water in it. In addition, there were piles of construction debris that needed to be removed from the building. Before the fab could achieve broom clean status, the water and debris had to be removed.

On previous construction jobs requiring protocol cleaning, Gregory Hesse, a project manager for MWM, had employed crews represented by locals affiliated with the Plumbers and Pipefitters Union to clean construction sites. Based on his satisfactory past experience, Hesse approached Scott, MWM's plumbing subcontractor, and inquired about Scott's ability to provide up to 25 additional workers for approximately 3 weeks to perform the site cleanup work required before the fab could enter Protocol 1. Scott confirmed that it could make available a sufficient number of ''mechanical laborers'' represented by Local 290 to do the cleanup, and submitted a bid for the project to MWM. Scott and MWM then amended their original contract

[1] Although neither MWM nor Scott entered an appearance at the hearing, the amounts establishing the Board's jurisdiction over these employers were set out in the testimony of witness Kevin Casali, a project manager for MWM.

to include the performance of the short-term construction cleanup.

Scott's mechanical laborers represented by Local 290 began the cleanup work at the Hyundai site on or about December 12, 1996. The cleanup work included water removal, or ''dewatering,'' which consisted of moving the water with large squeegees toward approximately 30 pumps placed throughout the building; hauling remnant lumber and construction debris off the premises; and performing erosion control work, which consists of erecting and maintaining plastic silt fences and hay bales to prevent the erosion of the site's hilly landscape during construction.

Prior to the hiring of Scott's mechanical laborers, laborers represented by Local 121 were employed by several other subcontractors to perform a variety of tasks at the Hyundai facility, including general site cleanup, dewatering, and erosion control. At least three subcontractors at the Hyundai site entered into Laborers compliance agreements with Local 121, which incorporate by reference a master agreement between the regional entities representing both the associated construction contractors and the laborers affiliates.

On learning of the presence of Scott's mechanical laborers at the Hyundai site, Wally Jensen, a representative of Local 121, contacted Kevin Casali, a project manager for MWM, to discuss the situation. Jensen told Casali that Scott's mechanical laborers were performing general cleanup work, dewatering, and erosion control previously performed by laborers represented by Local 121, and that the work should be exclusively assigned to Local 121's laborers. Mr. Casali agreed to inform MWM's onsite representatives that Scott's mechanical laborers were not to perform dewatering and erosion control, but that they would continue to perform the short-term, general site cleanup to prepare for entering Protocol 1.

On December 16, 1996, following the initial contact between Jensen and Casali, Lee Clinton, Local 121's secretary-business manager, wrote to Casali to dispute the assignment of cleanup work, dewatering, and erosion control to Scott employees. In the letter, Jensen informed Casali that Local 121 ''will take whatever steps are necessary and whatever economic action necessary to protect our laborers' jurisdiction and work.'' Jensen reiterated this point by declaring that if Casali failed to exclusively assign the work in dispute to laborers represented by Local 121, ''I will have no alternative but to take whatever action is necessary.''

On December 18, 1996, representatives of MWM and Local 121, including Hesse, Clinton, and Jensen, met to discuss the assignment of the disputed work. By the meeting's end, MWM agreed to return the disputed work to laborers represented by Local 121. Scott's mechanical laborers were laid off on or about December 18, 1996. Within 3 weeks of that layoff, Local 290 filed a charge alleging that Local 121 had violated Section 8(b)(4)(D) of the Act.

B. *The Work in Dispute*

The disputed work involves general cleanup, erosion control, and dewatering work to bring the Hyundai construction site in Eugene, Oregon, up to protocol cleanliness levels.[2]

C. *Contentions of the Parties*

Local 121 first contends that it did not threaten MWM in a manner that would give the Board reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Alternatively, Local 121 asserts that the work should be awarded to employees it represents based on (1) the Laborers master agreement, incorporated by reference in compliance agreements Local 121 entered into with subcontractors at the Hyundai site; (2) past practice of the subcontractors at this construction site; and (3) the superior training and skills of the employees represented by Local 121.

Local 290 asserts that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that the disputed work should be assigned to Scott employees represented by Local 290.

D. *Applicability of the Statute*

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, two jurisdictional prerequisites must be met. First, the Board must find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Second, the Board must find that the parties have no agreed-on method for the voluntary adjustment of the dispute.

These jurisdictional prerequisites have been met in this case. First, as noted above, Clinton wrote to Casali and informed him that Local 121 would ''take whatever steps are necessary and whatever economic actions deemed necessary to protect our laborers' jurisdiction and work.'' Given virtually identical language, the Board has found reasonable cause to believe that Section 8(b)(4)(D) was violated. *Holt Cargo Systems*, 309 NLRB 377, 378–379 (1992). We reject Local 121's contention that the letter contains no threat because it does not mention picketing or striking. We find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Second, the parties stipulated that they have not agreed on a method to adjust this dispute voluntarily. Accordingly, we find that the Board has jurisdiction to resolve this dispute.

[2] Counsel for Local 290 would not stipulate to this description of the disputed work at the hearing, but in its brief agrees that this description is ''generally accurate.''

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that the Board has certified either Local 290 or Local 121 as representatives of the employees involved in this case.

Local 121 argues that language contained in a regional master agreement, incorporated by reference in local compliance agreements it entered into with various subcontractors at the Hyundai site, governs the assignment of the work in dispute. Local 121, however, has no contract with MWM. Nor does Local 290.

Because neither union has a collective-bargaining agreement with MWM, the employer assigning the work in dispute in this case, we find that there is no collective-bargaining agreement that governs the work in dispute.

We find that these factors do not favor an award of the disputed work to either labor organization.

2. Employer past practice

Kevin Casali testified that during his prior employment with Marshall Contractors, he typically employed composite crews representing several building trades to perform the cleanup work associated with protocol cleanliness levels. Gregory Hesse testified that during his prior employment with Meissner & Wurst, he employed workers affiliated with the Plumbers and Pipefitters Union to perform similar work. MWM, as a joint venture, has never before overseen the construction of a fabrication facility. Thus, we find that the factor of employer past practice does not favor an award to either group of employees.

3. Employer preference and assignment

Kevin Casali and Gregory Hesse each testified that MWM prefers to assign the work in dispute to the Scott employees represented by Local 290. Further, when the construction project entered Protocol 1, MWM did, in fact, assign the work in dispute to Scott employees represented by Local 290. MWM reassigned the disputed work to employees represented by Local 121 only after Local 121 threatened economic action against MWM if it did not assign the work to Local 121 exclusively. The Board does not accord weight to the employer's assignment, or reassignment, of the disputed work that appears not to be representative of a free and unencumbered choice. See *Teamsters Local 158 (Holt Cargo)*, 293 NLRB 917, 921 (1989). Accordingly, the factors of employer preference and its initial uncoerced assignment favor an award of the disputed work to Scott employees represented by Local 290.

4. Area and industry practice

Testimony on this subject differed depending on the nature of the construction project examined. The varying evidence regarding area and industry practice is inconclusive, and we find that an analysis of this factor does not favor an award of the work in dispute to either employee group.

5. Economy and efficiency of operations

The record contains no evidence that the Board considers relevant to determining that the Employer would experience greater economy and efficiency of operations by using one group of employees rather than another.

6. Relative skills and training

Both parties concede that no special skills or training are required to perform the work in dispute. Local 121 argues, however, that its longer experience performing the disputed work at this particular jobsite gives it an overall skill advantage, particularly with regard to safety issues. Given that employees represented by either party are equally capable of performing the work in dispute, we find that an analysis of this factor does not favor an award to either party.

Conclusions

After considering all the relevant factors, we conclude that Scott employees represented by Local 290 are entitled to perform the work in dispute. We reach this conclusion relying on MWM's preference and current assignment. *Service Contractors*, 321 NLRB 1168 (1996). In making this determination, we are awarding the disputed work to employees represented by Local 290, not to that union or to its members. This determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Scott Co. of California represented by Plumbers, Steamfitters and Marine Fitters Local No. 290, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and

Pipefitting Industry of the United States and Canada, AFL–CIO are entitled to perform the general cleanup, erosion control, and dewatering work to bring the Hyundai construction site in Eugene, Oregon, up to protocol cleanliness levels.

2. Laborers International Union of North America, Local No. 121 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Meissner & Wurst/Marshall Construction Inc., a Joint Venture, to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Laborers International Union of North America, Local No. 121 shall notify the Regional Director for Region 36 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.